

C8FMKADT

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ADINA KADDEN,

4 Plaintiff,

5 v.

11 Civ. 4892 (SAS)

6 VISUALEX LLC,

7 Defendant.

8 -----x
9 New York, N.Y.
August 15, 2012
10:30 a.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN,

12 District Judge

13 APPEARANCES

14 MARK RISK

15 Attorney for Plaintiff

16 EPSTEIN BECKER & GREEN

Attorneys for Defendant

17 BY: TRAYCEE E. KLEIN

18 MARGARET C. THERING

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(Trial resumed)

THE COURT: You have a witness, Ms. Klein?

MS. KLEIN: Yes, I do. Your Honor, we would like to call David Mykel to the stand.

MR. RISK: Your Honor, may I say briefly that I think Mr. Mykel is a newly-hired consultant at Visualex. I have not been given his offer letter or résumé. I think that's within the discovery. I'm not interested in doing anything to delay the completion of this proceeding except to note that.

THE COURT: Do you have the offer letter and résumé, Ms. Klein?

MS. KLEIN: I just forwarded -- thank you. I do have it. I just now read it. I'll share a copy, of course. I don't believe we have the offer letter. We have the résumé.

THE COURT: Is there an offer letter?

MS. KLEIN: There is an offer letter.

THE COURT: Where is it?

MS. KLEIN: I don't have it with me, your Honor.

THE COURT: Call your office and have it faxed to my office right away: Let me give you the fax number.

DAVID MYKEL,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. KLEIN:

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Mykel - direct

1 Q. Good morning.

2 A. Good morning.

3 Q. Mr. Mykel, are you currently employed?

4 A. Yes.

5 Q. Where are you employed?

6 A. Visualex LLC.

7 Q. And for how long have you been employed by Visualex?

8 A. Since June 17.

9 THE COURT: Of 2012?

10 THE WITNESS: Of this year.

11 Q. What position were you hired for?

12 A. Litigation graphics consultant.

13 Q. Do you have familiarity with a litigation graphics
14 consultant?

15 A. Yes, I do.

16 Q. And have you been a litigation graphic consultant prior to
17 joining Visualex?

18 A. Yes, I have.

19 Q. Can you briefly tell the Court what your educational
20 background is?

21 A. I have a dual degree in psychology and criminal justice
22 from the University of Albany and I have a master's degree from
23 forensic psychology from Marymount University.

24 Q. Can you tell the Court what a litigation graphic consultant
25 at Visualex does? What you do as a litigation graphics

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Mykel - direct

1 consultant?

2 A. As a litigation graphics consultant for Visualex I work
3 with clients on a daily basis, essentially digesting the
4 complex subject matter they have that's coming in from their
5 cases, filtering it through my own background and experiences,
6 applying my analytical skills as well as critical thinking
7 skills in order to produce graphics and case persuasion and
8 strategy that will persuade and communicate properly our
9 intended message to the trier of fact.

10 Q. Is your experience in going about doing your job as a
11 graphic consultant the same at Visualex as it has been in your
12 prior experiences?

13 MR. RISK: Objection.

14 A. Yes.

15 THE COURT: I'll allow it. Is it the same as the
16 other companies?

17 THE WITNESS: Yes, it is.

18 THE COURT: Which other companies were you at?

19 THE WITNESS: I was previously at my own company
20 called the Art of Trial Sciences. Prior to that I worked for a
21 company called Courtroom Sciences; and prior to that, a company
22 called Litigation Communications; prior to that, a company
23 called Jury Research, Inc.

24 THE COURT: And at all those places it's the same
25 technique used pretty much at Visualex?

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Mykel - direct

1 THE WITNESS: Yes. There is some variation, but
2 essentially you are using the same skill set to provide value
3 to your client, which is our ultimate goal.

4 THE COURT: How many years does that total when you
5 take us back to that first one in the series?

6 THE WITNESS: It will be coming up on 11 years in
7 November.

8 Q. And, Mr. Mykel, in all those experiences that you just
9 talked about, have you had occasion to come across other
10 litigation graphic consultants?

11 A. Yes.

12 Q. And are you a member of any professional organizations?

13 A. Yes. I'm a member of the American Society of Trial
14 Consultants, the American Psychological Association, and the
15 American Judicature Society.

16 Q. Of all of the graphic consultants that you have known -- is
17 it 11 years that you said you've been in the industry?

18 A. Almost.

19 Q. In your 11 years in the industry, do you know what the
20 typical educational background is?

21 A. It varies.

22 MR. RISK: Objection. No foundation.

23 THE COURT: You talked to these other graphic
24 consultants over the years.

25 THE WITNESS: Absolutely.

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Mykel - direct

1 THE COURT: How many people have you met, do you
2 think?

3 THE WITNESS: Hundreds.

4 THE COURT: I'll allow it.

5 MR. RISK: The foundation element wasn't typicality,
6 your Honor?

7 THE COURT: Sorry?

8 MR. RISK: The question was what's their typical
9 education.

10 THE COURT: I heard that.

11 Q. In your experience, what is their education?

12 A. Every consultant that I know and have ever worked with and
13 known has at least some sort of master's, Ph.D., or law degree,
14 so advanced degrees.

15 Q. And can you explain the main part of your job that you do
16 on a daily basis?

17 A. I would say the main part -- it varies, as most consultant
18 roles do. You speak with the client, understand what their
19 case is about, request case materials from them, read the case
20 materials, draw up graphic and case strategy recommendations
21 based on that. Again, communicate with the client to see if
22 they have any suggestions or if we are going in the right
23 direction from what they have come up to at this juncture, and
24 then start drawing up the graphic recommendations and working
25 with our art team in order to create those for the client.

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Mykel - direct

1 Q. And in your experience at Visualex, how are litigations or
2 projects staffed?

3 A. They are staffed typically with two consultants and then we
4 have our support staff of administrative people as well as
5 graphic artists and animation artists.

6 Q. When you say two consultants, does that account for all of
7 the consultants that work at Visualex?

8 A. Currently, yes, because there is only two of us.

9 THE COURT: Who are the two?

10 THE WITNESS: Myself and Ms. Romano.

11 THE COURT: That's it right now.

12 THE WITNESS: Currently, yes.

13 Q. You both work on all of the cases?

14 A. Yes.

15 Q. Are you familiar with what it means as a litigation graphic
16 consultant when you use the word proofing?

17 A. Yes.

18 Q. Do you record your activities during the workday?

19 A. Every day.

20 Q. And have you done that for most of your career?

21 A. All of my career.

22 Q. And in performing your role as a graphic consultant, have
23 you had occasion to describe your work as proofing?

24 A. I'm sorry. Could you repeat that question?

25 Q. Yup. You report your time?

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Mykel - direct

1 A. Yes.

2 Q. Have you ever had occasion to report your consulting time
3 as proofing?

4 A. Yes.

5 THE COURT: Proofreading?

6 THE WITNESS: Yes.

7 Q. Proofreading or proofing?

8 THE COURT: Which is it?

9 THE WITNESS: It's the same. They are synonymous.

10 Q. Proofreading and proofing are the same?

11 A. Yes.

12 Q. When a consultant or when you are proofing, what are you
13 doing?

14 A. A variety of things. Going over the documents and the
15 graphics, making sure that they adhere to the themes that we
16 developed by reviewing the case materials, ensuring that the
17 message that we are trying to convey is coming through in a
18 persuasive manner, that the message can be communicated clearly
19 to the trier of fact, making sure the content is accurate, both
20 factually and phonetically, spelling, layout, design, ensuring
21 that everything that we put into that piece of work carries the
22 quality and integrity that I intended when I first created it.

23 Q. And is there a different process if you didn't create the
24 original idea for the demonstrative?

25 A. Not necessarily.

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Mykel - direct

1 Q. Can you explain what difference there is, if any?

2 A. There really isn't much of a difference. Either way, every
3 graphic that comes across my desk I'm looking at it from my
4 analytical perspective to ensure that knowing the case, that
5 from the reading all the case materials, regardless if I have
6 two or three or however many consultants are working on the
7 case with me, I'm looking at it with a critical eye, analytical
8 eye to address the things that I just previously mentioned in
9 my last answer, and to ensure that everything is put in front
10 there.

11 The only slight difference would be that I may have to
12 ask a question of the other consultant to make sure that I'm
13 thinking on the right track to say, okay, is this what we are
14 trying to convey with this graphic.

15 Q. In those scenarios when you do that do you consider
16 yourself not to be acting as a consultant?

17 A. No.

18 Q. Why is that?

19 A. Because I'm essentially doing every job duty that I was
20 hired for as a consultant. In any industry a consultant role
21 takes on a variety of hats. And no matter what you are doing
22 or what you are looking at, you are always deemed a consultant
23 and should be working accordingly.

24 Q. And when you are doing proofing of revisions, as I've heard
25 that word used throughout this litigation, are you acting as a

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Mykel - direct

1 proofreader in the sense of somebody who is just comparing one
2 thing to another?

3 A. That is part of the job, yes.

4 Q. And is there anybody else that does that job?

5 A. Yes. The entire staff.

6 Q. And is it fair to say that by the time it gets to the
7 consultant is it the final pair of eyes?

8 A. Yes, should be.

9 Q. And, again, in your perspective, at all times, what is the
10 primary responsibility of your job?

11 A. I would say the primary responsibility of my job is to
12 ensure that we put out the best quality work product and that
13 we are adding value to our client. That's what they are paying
14 us for.

15 Q. And does it matter if you are having face-to-face contact
16 with clients?

17 A. No. The job is still the same.

18 Q. And in your 11 years of experience is a lot of the
19 consulting part of the work done through various forms of
20 communication?

21 A. Yes.

22 Q. Can you tell us what those are?

23 A. Sometimes they are face-to-face meetings, sometimes they
24 are e-mails, sometimes they are telephone conversations,
25 sometimes they are conference calls with multiple attorneys or

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Mykel - direct

1 clients on the line.

2 MS. KLEIN: Your Honor, I have no further questions.

3 THE COURT: Thank you.

4 Did you reach your office?

5 MS. ROMANO: Yes. They are faxing it.

6 MR. RISK: I can try to start.

7 THE COURT: It has not arrived yet. I don't know why.

8 You want to start or not?

9 MR. RISK: I will. I won't be very long. I may soon
10 be finished. Let me do what I can do.

11 I'll try, your Honor.

12 CROSS-EXAMINATION

13 BY MR. RISK:

14 Q. Mr. Mykel, we met a minute ago. I'm Mark Risk. I
15 represent Adina Kadden who is a former employee of Visualex.

16 So you are just about up to your two-month anniversary
17 at Visualex?

18 A. Correct.

19 Q. And you do consulting work apart from your work at
20 Visualex?

21 A. I'm sorry. I don't understand your question.

22 Q. What is DM Consulting, LLC?

23 A. That is a company that I own.

24 Q. And do you do work in that company now?

25 A. No, I do not.

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Mykel - cross

1 Q. So your sole source of income is from your work at
2 Visualex?

3 A. Correct.

4 THE COURT: Does that company still exist?

5 THE WITNESS: Yes. It's under an umbrella that the
6 Art of Trial Sciences now, but the company still does exist.

7 THE COURT: It doesn't generate anything for money.

8 THE WITNESS: It's a sole proprietorship. If I'm
9 working for Visualex, part of my agreement to become a
10 consultant with Visualex was to not compete. Therefore, I
11 cannot have my own side business.

12 THE COURT: Is the business defunct?

13 THE WITNESS: I would say it's in a holding pattern, I
14 guess.

15 THE COURT: It's not operating?

16 THE WITNESS: No.

17 Q. You were working for yourself as a trial consultant?

18 A. Prior to Visualex, correct.

19 Q. And now you are working for Visualex?

20 A. Correct.

21 Q. Full time?

22 A. Yes.

23 Q. You work with trial teams in your job?

24 A. Yes.

25 Q. And trial teams are groups of lawyers and paralegals at a

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Mykel - cross

1 law firm that are working on a case?

2 A. In addition to, yes.

3 THE COURT: In addition to?

4 THE WITNESS: There is always a corporate client
5 involved, corporate in-house counsel.

6 Q. And the trial team is representing the corporation?

7 A. Typically.

8 Q. And they have in-house counsel?

9 A. Typically.

10 Q. And typically, in your experience, the ultimate payer of
11 your fee is the corporation?

12 A. No.

13 THE COURT: It's the law firm?

14 THE WITNESS: It could be either one.

15 Q. Mr. Mykel, I am going to hand you what I am going to mark
16 as Plaintiff 30. Is the Plaintiff's 30 your LinkedIn page,
17 Mr. Mykel? I know it's hard to read and I just heard you were
18 coming and did the best I could.

19 A. Yes, it is.

20 Q. Why isn't last name on the LinkedIn page?

21 A. I'm sorry?

22 Q. You see it says David W. M. Do you know why that is?

23 A. Yes. Because I believe you have to pay for the services to
24 see people's last names. I also see it's see full name,
25 hyperlink right next to it that I'm sure if you clicked on it

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Mykel - cross

1 you would probably see my full name or ask you to pay for a
2 service so you can see my full name.

3 Q. You didn't do anything to restrict access to your name?

4 A. Not that I'm aware of.

5 Q. Down at the bottom of the page -- did you write this
6 information onto LinkedIn?

7 A. Yes.

8 Q. And down at the bottom of the page there is a description
9 of your job at Visualex, isn't there?

10 A. Yes, there is.

11 Q. And you have the large type edition, Mr. Mykel. Let me try
12 to read it from mine. June 2012 to present, litigation
13 communications consultant who assists trial teams with the
14 development and visual approach that incorporates case strategy
15 and maximizes impact through the integration of persuasion,
16 communication, and presentation techniques as well as
17 technology.

18 Did I read that correctly?

19 A. Yes, did you.

20 Q. That's what you wrote?

21 A. That's correct.

22 Q. Now, you have your job title in all caps, litigation
23 communications consultant?

24 A. It's not in all caps.

25 Q. Initial caps. Litigation communications consultant. Why

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Mykel - cross

1 did you capitalize that?

2 A. Just for readability.

3 Q. That's your title at Visualex, litigation communications
4 consultant?

5 A. Currently, yes.

6 Q. You testified a moment ago that in your experience over
7 this 11 years, your company's bill is either paid by the law
8 firm or the law firm's ultimate client, is that right?

9 A. Yes.

10 Q. And when it's paid by the law firm you don't know whether
11 they seek reimbursement from the ultimate client?

12 A. I assume they do.

13 MR. RISK: I am just waiting at this point for the
14 offer letter, your Honor.

15 THE COURT: It's here. What's the problem now?

16 MR. RISK: I think they are missing a page now.

17 MS. KLEIN: That letterhead from the second page is on
18 the first page.

19 THE COURT: Is that the whole thing?

20 MR. RISK: No.

21 MS. KLEIN: It looks like it's cut off.

22 MR. RISK: Let me see what I can do.

23 THE COURT: We can call them, come up here, use our
24 phone and have it faxed right away. Obviously, they have it
25 right away.

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Mykel - cross

1 We have a better version.

2 Q. Mr. Mykel, you signed a written offer letter with Visualex,
3 yes?

4 A. Yes.

5 Q. On June 18?

6 A. I believe so.

7 Q. You were living in Texas at the time?

8 A. Dallas, yes.

9 Q. And you're paid at a base salary of \$100,000, is that
10 right?

11 A. Yes.

12 Q. You got a \$5,000 relocation stipend, is that right?

13 A. Correct.

14 Q. You got a signing bonus of \$5,000.

15 A. Is that a question?

16 THE COURT: It's a question.

17 A. Yes.

18 Q. You're eligible to receive incentive compensation, is that
19 right?

20 A. Correct.

21 Q. Based on Visualex's incentive compensation plan, yes?

22 A. Correct.

23 Q. What's that?

24 A. That's basically, I would say, a bonus structure. Based on
25 the amount of work that you bring in, you are compensated back

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Mykel - cross

1 a certain percentage of that work.

2 Q. And do you have client relationships that you hope to bring
3 to Visualex?

4 A. Yes.

5 Q. May I ask you how much business you are hoping to bring to
6 Visualex?

7 THE COURT: You mean in dollars?

8 MR. RISK: In dollars.

9 MS. KLEIN: Hoping and speculation?

10 THE COURT: I understand that. I think the point he
11 is trying to make, and it's a fair one, that he expects to be a
12 bit of a business getter, which was probably never the
13 expectation of Ms. Kadden, who was new to the business.

14 MS. KLEIN: Your Honor, she wasn't new to the
15 business.

16 THE COURT: Please. She was a summer associate at the
17 Attorney General's office and had one job for a year. This man
18 has been in the business for ten years. He has a business
19 base. He had his own business. He is a business guy. I think
20 it's a fair question. There is a clear distinction. Ten years
21 in the business? What's your hope in terms of bringing in
22 business? Would you hope to bring in \$100,000 of business, \$1
23 million of business?

24 THE WITNESS: I would hope to bring in millions of
25 dollars.

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Mykel - cross

1 THE COURT: What's your realistic hope for your first
2 year here in New York?

3 THE WITNESS: It's difficult to tell because you have
4 different markets, different economies.

5 THE COURT: Somebody who has been recently in
6 business, if you did less than 100,000, would that be
7 disappointing, let's say, to you?

8 THE WITNESS: As a person, yes, my personality, it
9 would.

10 THE COURT: That's your minimum hope, is that it?

11 THE WITNESS: Yes.

12 THE COURT: You hope to do even better than that?

13 THE WITNESS: Of course.

14 Q. If you brought \$100,000 of business to Visualex in a year,
15 what would you receive under the terms of your agreement?

16 THE COURT: What percentage of that 100,000?

17 THE WITNESS: 3 percent, if I'm correct.

18 THE COURT: Is that 31 that you are marking?

19 MR. RISK: Yes. As you know, there is only one copy,
20 and I am going to show it to the witness and that's that.

21 THE COURT: Did you offer 30, by the way, the LinkedIn
22 pages? Did you wish to?

23 MR. RISK: Yes. I'm sorry. I want to offer 30,
24 Plaintiff's 30.

25 THE COURT: Any objection to Plaintiff's 30, which is

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Mykel - cross

1 the LinkedIn pages?

2 MS. KLEIN: I don't have it.

3 MR. RISK: True.

4 THE COURT: My clerk is giving you our copy so you can
5 look at it the same time.

6 In the meantime, do you object to 31, which is the
7 offer letter?

8 MS. KLEIN: I don't object to it. It is what it is.
9 I don't believe it's relevant.

10 THE COURT: That's a different objection. Overruled.
11 31 is received.

12 (Plaintiff's Exhibit 31 received in evidence)

13 MS. KLEIN: I don't have any objection as long as it's
14 what the witness says it is, just a portion of his LinkedIn
15 page.

16 A. It's redacted in a form because if you notice the top pages
17 are actually cut off.

18 THE COURT: It is what it is. The material in it is
19 accurate. You put it there.

20 THE WITNESS: The material I was questioned on is
21 accurate.

22 THE COURT: 30 is received, 31 is received.

23 (Plaintiff's Exhibit 30 received in evidence)

24 Q. Mr. Mykel, I have just put before you our only copy of
25 Plaintiff's Exhibit 31. Is that your offer letter with

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Mykel - cross

1 Visualex?

2 A. Yes, it is.

3 Q. And does it bear your signature?

4 A. Yes, it does.

5 THE COURT: By the way, I don't have it in front of
6 me. Tell me. 3 percent for anything you bring in. Does that
7 rise with the quantity? What I mean by that, do you get a
8 bigger percentage if you bring in more dollars, or is it always
9 3?

10 THE WITNESS: Not according to their current contract.

11 THE COURT: It's always 3?

12 THE WITNESS: It's 3 and then 2 and 1.

13 THE COURT: You get less the more you bring in?

14 THE WITNESS: According to this. Just to make sure --

15 MR. RISK: If I may.

16 A. I don't believe it's in here, actually.

17 Q. There is an incentive plan referenced in there. Can I just
18 ask Mr. Mykel, how you happen to get the job at Visualex?

19 A. Through a recruiter.

20 Q. Who was the recruiter?

21 A. Josh Sacks.

22 Q. Did you meet with Ms. Romano before you were offered the
23 job?

24 A. Yes.

25 Q. You flew here to New York and met with her?

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Mykel - cross

1 A. No. We did a Skype interview.

2 Q. When you came to Visualex this was the first time you had
3 actually met her?

4 A. Yes.

5 Q. What discussion did you have with Ms. Romano about your
6 ability to bring business to Visualex?

7 A. We discussed if I had prior clients and if, you know, I
8 would obviously stay in contact with them with the hope of
9 bringing business to Visualex.

10 Q. Did you tell her some of the clients you hoped to stay in
11 touch with?

12 A. I did not mention the specific names, no.

13 MR. RISK: I have nothing further, your Honor.

14 THE COURT: Anything further for this witness,
15 Ms. Klein?

16 MS. KLEIN: Yes, your Honor.

17 REDIRECT EXAMINATION

18 BY MS. KLEIN:

19 Q. Mr. Mykel, are you a business partner of Visualex?

20 A. No.

21 Q. Are you an employee?

22 A. Yes.

23 Q. And at times is your work billed out? What I mean by that,
24 there are times when your consultant work is passed on to
25 clients.

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Mykel - redirect

1 A. As in they pay the bill?

2 Q. Yes.

3 A. Yes.

4 Q. Do you know what your hourly rate is for your consulting
5 services at Visualex?

6 A. I believe it's \$225 an hour for flat regular time.

7 Q. And that's for your consulting time?

8 A. Correct.

9 THE COURT: And then if it's over a certain hour, it
10 goes to one and a half? Does it become 337 or something?

11 THE WITNESS: Yes.

12 THE COURT: When does it become 337?

13 THE WITNESS: It depends on the contract that we have
14 with the client. But if you have extended hours that go into
15 the wee hours of the morning.

16 Q. Were you instructed anything at Visualex when you first
17 started working about generally how you should categorize the
18 consulting time in regards to whether it be the premium time or
19 the straight time?

20 A. Yes.

21 Q. What were you told?

22 A. I was told that pretty much everything I will do is going
23 to fall under consulting, and then there is a few other
24 categories like conference calls and things like that that
25 would be further broken down.

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Mykel - redirect

1 Q. Were you ever instructed that if you were not doing
2 consulting work that it should be billed under a certain
3 category?

4 A. Can you repeat the question. I'm sorry.

5 Q. Were you ever instructed that if you were not doing
6 consulting work that it should be billed under a certain task?

7 A. If I wasn't doing consulting work I would be told to put it
8 under whatever task it is associated with, admin or training or
9 marketing or whatever else it would be.

10 Q. Are you aware whether or not there is a category item on
11 the program that you use that is called project management?

12 A. There may be. We have a lot of entries in there. I have
13 never used the project management entry. I've always used
14 consulting for what I've done.

15 Q. Why is that?

16 A. Because my title of my job is a consultant, and everything
17 that I do falls under that umbrella, whether it's proofreading,
18 whether it's reading, checking content, reviewing graphics,
19 talking to the art director, reviewing case materials. Those
20 were all hats that a consultant wears.

21 Q. And do you know, does anybody else that works at Visualex
22 read the materials that you just talked about other than the
23 consultants?

24 A. No.

25 Q. No, you don't know?

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Mykel - redirect

1 A. No, they do not. Currently, Lillian and I are the only two
2 people that read the materials.

3 Q. And is it necessary for a graphic consultant to do their
4 job for them to be familiar with materials?

5 A. Absolutely.

6 Q. And why is that?

7 A. Because what the client is paying for and your value is
8 added to understand and digest the case materials, break them
9 down into simple subject matter that people can understand, and
10 be able to visually communicate that to your audience.

11 Q. And if you were working on a revision and a client said to
12 you in either an e-mail or verbally, David, change the color of
13 that and move that all to the right, is your job as a
14 consultant to just do that?

15 A. No. There would be some questions I would have. First, I
16 would ask them why they would like to do that, and then,
17 depending on their reasons, I would tell them why we do it this
18 way, why it needs to stay this way. And if we change it, it's
19 going to change our strategy, our presentation techniques, and
20 then ultimately the persuasiveness of the graphic.

21 THE COURT: Of course, ultimately the client will
22 decide.

23 THE WITNESS: Yes. But the more that you let them
24 know this is what you are hiring me for, please allow me to do
25 this for you. Typically, they will give way to us, unless it's

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Mykel - redirect

1 something that's content factually based.

2 THE COURT: At the end of the day the client is going
3 to decide what the graphic is?

4 THE WITNESS: They will decide what they present, yes.

5 THE COURT: One would think. Okay.

6 MS. KLEIN: No further questions.

7 THE COURT: Anything further of this witness?

8 MR. RISK: No, your Honor.

9 THE COURT: Thank you for coming in. All set.

10 THE WITNESS: Thank you, your Honor.

11 (Witness excused)

12 THE COURT: Any more witnesses from either side?

13 MS. KLEIN: No, your Honor.

14 MR. RISK: No, your Honor.

15 THE COURT: That closes the evidentiary portion,
16 unless there are more documents either side had planned to
17 offer. Were there?

18 MR. RISK: No, your Honor.

19 THE COURT: Then at the end of the day can you
20 resubmit your books with just the admitted exhibits? Because I
21 know it was very good of you to prepare these books, but they
22 probably had more exhibits than you used. I just want the ones
23 that are actually in evidence.

24 MS. KLEIN: Your Honor, for the ones that are quite
25 extensive, and we only used several pages, do you want the

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1 excerpts?

2 THE COURT: Yes. Except for the one of all her time
3 sheets. I think those I really wanted to look through it
4 anyway.

5 Is there anything else you want me to look through
6 every page of, of the big ones?

7 MS. KLEIN: Again, what is in there right now is just
8 a very small representative portion of her work. As you can
9 see from her time sheets, there is over 55 cases that she
10 worked. I would fill this courtroom if we brought all of her
11 work in. So that is just a sample of the cases. So, again, if
12 you are looking for samples of her work, again, that's parts of
13 it, the bigger one of, I believe it's I and J or J and K.

14 MR. RISK: At this point what's been offered and is in
15 is in and what has not been offered and is in is not in.

16 THE COURT: Except for a couple of those big fat
17 exhibits. I think she offered all of J, but then to speed up
18 the testimony she only went through small excerpts.

19 MR. RISK: I don't think any of those, correct me if
20 I'm wrong, were exhibits that we had stated an objection to in
21 the pretrial order.

22 THE COURT: That may be right, too. To the extent you
23 need to fix these binders to slim them down to what was
24 actually received in evidence, I can have them given back to
25 you.

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1 MS. KLEIN: Sure.

2 THE COURT: And resubmit them at the earliest possible
3 time.

4 With that, the evidentiary portion of the trial
5 closed, if you are prepared to make brief closing arguments,
6 I'm happy to hear them.

7 MR. RISK: Your Honor, in what order would you like us
8 to do that?

9 THE COURT: She went first. She gets to go last on
10 the burden, so you will go first.

11 One second, we are still distributing notebooks back.
12 It's extraordinary how much paper there is in the digital age.
13 You think there would be one CD, that's it, DVD, one DVD.

14 MS. KLEIN: Some of the courts still like the actual
15 hard copy.

16 THE COURT: I know. I just think it's funny. You
17 think we have transitioned, but we really are in a intermediate
18 area. Another five or ten years I guess it will all be DVD.

19 Mr. Risk, I'm ready.

20 MR. RISK: I begin by reminding your Honor of the
21 Supreme Court's directive which has been reechoed by the Second
22 Circuit as recently as Young v. Cooper Cameron, that the FLSA
23 exemptions are, quote, to be narrowly construed against the
24 employers seeking to assert them and their application limited
25 to those established as plainly and unmistakably within their

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1 terms and spirit.

2 When Adina Kadden first contacted me a little more
3 than a year ago, I would have never imagined that I'd be here
4 today. Partly because I don't think I have ever had a matter
5 that proceeded from complaint to federal trial in 13 months,
6 and I should pause just for a nanosecond to say that the
7 professional experience of trying a case in this courthouse is
8 a precious professional experience for me. I think it is for
9 Ms. Kadden and I'm certain it is for the Visualex team and that
10 aspect has been remarkable.

11 But really what I couldn't have imagined when Ms.
12 Kadden first called me in is that it would ever get anywhere
13 like this because the reason is that when she first talked to
14 me she showed me two documents. Your Honor talks about bring
15 just one CD. Maybe I should have left all the boxes home and
16 brought two documents, the job description and the offer
17 letter.

18 And I thought 13 months ago that all I would have to
19 do is take those and show them to Visualex and that matter
20 would be resolved quickly.

21 She sent me Exhibit 2, the job description, which,
22 more than any document I have ever seen, reads like it was
23 written for a law school exam on FLSA exemptions. It's quite
24 remarkable. It's now been confirmed that it's the real thing
25 and words chosen by Visualex. It's admitted to in the requests

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Summation - Mr. Risk

1 for admission, and we heard Ms. Romano testify about it. And
2 it was written by Visualex before the trial, before the
3 complaint, before Ms. Kadden was terminated.

4 THE COURT: I think I need to interrupt. Can I get my
5 notebook back with Exhibit 1 and 2. I want to follow along. I
6 know what they are, of course, but I just want to look at both
7 1 and 2 while you are speaking.

8 Thank you. I apologize for that.

9 MR. RISK: I think I won't have to give you volume 2,
10 your Honor.

11 THE COURT: I know. I just wanted to stare right at
12 them while you speak.

13 MR. RISK: Exhibit 2, it's the carefully-crafted job
14 description by Visualex given to the headhunter to specifically
15 recruit Ms. Kadden's position when they had not even heard of
16 Ms. Kadden, much less changed her compensation, much less
17 terminated her, much less been sued by her. These are the
18 words.

19 And on two of the exemptions I think it's pretty quick
20 and clean and clear. We already know from Exhibit 2 that there
21 is no specific educational requirement for this job. A
22 graduate degree is preferred. Some vague examples are given
23 and an et cetera is added. And Ms. Romano testified quite
24 forthrightly that she does prefer someone with a graduate
25 degree in -- I think the testimony confirmed what Exhibit 2

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1 says, which is a graduate degree in anything and sometimes a
2 graduate degree in nothing will be acceptable for this job.

3 Turning quickly -- let me hold onto that. It's hard
4 to imagine a stronger statement that the position for which Ms.
5 Kadden was hired was not a graphics design position. Visualex
6 chose to render that in capital letters, so it was clear.

7 And when I first talked to Ms. Kadden, it wasn't hard
8 to figure out what the job was about and what the primary
9 responsibilities are, because it was specifically denominated.
10 Now we have had layers and layers of testimony, including by
11 Mr. Mykel, about what the responsibilities are. Here they are
12 under the heading primary responsibilities, colon.

13 Visualex says throughout, and I think incorrectly,
14 that the question before the Court is whether Ms. Kadden was
15 hired because she had a law degree. And the case law and the
16 regs just don't sustain that. The focus of the inquiry is on
17 academic requirements of the position at issue. That's what
18 the Second Circuit said in Young V. Cooper Cameron in 2009.
19 It's an explicit Second Circuit holding in that case. We hold
20 that employee is not an exempt professional unless his work
21 requires knowledge that is customarily acquired after a
22 prolonged course of specialized intellectual instruction.
23 There is nothing wrong with Visualex looking for someone with a
24 certain level of education, but that's not what the FLSA
25 contemplates. It's not. It's quite clear that there is no

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1 specific educational training required for this job.

2 The regulations say, quote, speaking of the learned
3 profession equal exemption that it's not available for
4 occupations that customarily may be performed with only the
5 general knowledge acquired by an academic degree in any field.

6 Where are those regulations? I have them.

7 What I did, your Honor, we were talking about the
8 regulations the other day and I printed up a set on the
9 administrative exemption which I'll get to in a minute. I just
10 made it a little larger for us to talk about it.

11 THE COURT: Thank you.

12 MR. RISK: I'm not up to that exemption, but I know
13 the Court is interested in that and I want to look at it with
14 your Honor.

15 So under the learned professional exemption we never
16 get to the mishmash of which side the duties fall or don't
17 fall, although I remind the Court, if we do, the question is
18 what Ms. Kadden's primary duties are, not her sometimes duties
19 when she is stepping in as lead consultant. And the burden is
20 on the employer. So if it's black, it's one. If it's white,
21 it's the other. But if it's gray, then Ms. Kadden is
22 nonexempt.

23 I've already briefed the education prong in our
24 pretrial brief which I looked at again and it holds up pretty
25 well from the trial testimony.

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Summation - Mr. Risk

1 I just want to quickly say that the cases cited in
2 there are very relevant. The Solis case from the Ninth Circuit
3 in 2011 looked at the stated job description. In that case
4 they were public social workers and there was a very public --
5 it was an internal document which the employer said what
6 degrees they were looking for or not, and there was some play
7 in that, some flexibility, and the Court found those social
8 workers nonexempt.

9 The Eighth Circuit in 1999 in Fife v. Harmon looked at
10 air field operations specialists and there the advertisement
11 called for someone with a BA in aviation or related field or
12 equivalent experience. The Eighth Circuit found that to be a
13 nonexempt position and it reminds us very much of the way Ms.
14 Romano described her process when she is looking for in this
15 job.

16 The Eleventh Circuit in 1991, in the Deibeck case
17 looked at probation officers. There, a supervisor was on the
18 stand and said in a more colorful manner that a BA in any field
19 would qualify. I think in the Deibeck case the supervisor said
20 a BA in basket weaving would also be amongst the degrees to
21 qualify. A little more colorful, but very similar to what Ms.
22 Romano said here. We never reached the duties test. If we do,
23 we still think we do fine.

24 Exhibit 16, which is at the back of the book, your
25 Honor, was our chart based on the time records that are Exhibit

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Summation - Mr. Risk

1 7, and you'll recall all we tried to do there is separate out
2 proofing. Exhibit 16 is our chart in which we took all the
3 billable hours by category and it shows quite clearly that the
4 vast majority of Ms. Kadden's time was recorded as proofing.
5 And we separated out any time she did anything related to
6 preparation of a new graphic, which sometimes included the
7 proofing of those. That's the tale of the tape. That's how
8 she spent her time. I know various things have been said about
9 the art of proofing and what's done, but it's still proofing,
10 and much of it is proofing on deadline. And we think that
11 because of the way Congress and the statute have allocated the
12 burden, if it's gray, she is nonexempt.

13 There are lots of questions and lots of testimony
14 about what Ms. Kadden occasionally did or sometimes did, but
15 that's not the focus of the FLSA. It doesn't matter if she
16 once pulled the sword out of the stone. The question is what
17 her primary duties were. And it seems, it was proofing and
18 checking the revisions. And if she made comments on the flap
19 sheet, it went to Ms. Romano, the lead consultant.

20 To the creative exemption. I don't want to spend more
21 than a moment on the creative exemption. To be a creative
22 professional the work must be performed, quote, in a recognized
23 field of artistic or creative endeavor. That's the regs at
24 Section 541.302. That includes the graphic arts, but we knew
25 last June, from Exhibit 2, that this is not a graphic arts

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1 position.

2 I don't think any more need to be said about whether
3 Ms. Kadden is a creative artist. And I imagine that Visualex
4 would say that the person who said to Salvador Dali, why don't
5 you paint some clocks that were melting would qualify for the
6 creative arts exemption.

7 Now to the administrative exemption, and we did talk
8 about that in court the other day, which prompted me to make
9 the regs bigger. And partly, after a couple of long days here,
10 it is harder to see the smaller version for me, your Honor.
11 It's quite clear and this goes right from the headings. The
12 primary duty must be the performance of work, quote, directly
13 related to the management or general business operations of the
14 employer or the employer's customers. And it's that little
15 prong I think that your Honor had raised the other day we were
16 looking at.

17 Even Visualex, as I understand it, does not contend
18 now that Kadden was an administrator at Visualex. I think
19 that's off the table. She was there to do work for his clients
20 for which she billed them. I think Visualex is now arguing
21 that Kadden was an administrator for its clients.

22 Now, the regs provide that a consultant is exempt when
23 she is consulting on the management or general business
24 operations of the customer. If the primary duty is acting as
25 an advisor of the consultant to the employer's customers, then

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1 the consultant might be exempt. And that is on the second page
2 of what I've handed your Honor in 541.201(c) and I apologize.
3 I happen to have a mark on that line. I think that's what
4 Visualex keeps talking about when they say, very matter of
5 factly, well, consultants are exempt.

6 C follows B, which states: The kinds of
7 administrative positions that qualify for the administrative
8 exemption, but it's clear that in every case it should be about
9 the management or general business operations of the employer
10 or its customer. C says: Thus, for example, employees acting
11 as advisors for consultants to their employer's clients or
12 customers, as tax experts or financial consultants, the first
13 two items in B above, for example, may be exempt.

14 But the consulting still has to be related to
15 management or general business operations of the customer if
16 the customer is Stroock Stroock & Lavan or if it's deemed to be
17 Stroock Stroock & Lavan's corporate client or any of the other
18 law firms that are represented. Perhaps I should have proposed
19 that we subpoena the managing partner of Stroock Stroock &
20 Lavan and ask him under oath if Adina Kadden had given
21 management or general business advice to Stroock Stroock &
22 Lavan. I'm afraid your Honor would have called the marshals
23 for me had we proposed to do that.

24 We heard it again from Mr. Mykel. This word has been
25 bandied around a lot and we haven't heard much about it. Trial

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Summation - Mr. Risk

1 teams. Mr. Mykel says we worked with trial teams. Ms. Romano
2 said we worked with trial teams. Other witnesses, trial teams.
3 Mr. Daignault yesterday, my team, her team. We work with
4 Adina's team and our team. Visualex is hired to work with
5 teams of lawyers and paralegals on specific cases, usually
6 trials. Mr. Mykel talked about the retainer letters today.
7 They retained to work on cases, not to provide general business
8 advice to Stroock Stroock & Lavan. For all of the times we
9 heard about trial teams, not once in this trial in two days did
10 I hear words like the management committee, the managing
11 partner, the firm administrator, the controller, the marketing
12 officer, the recruiting coordinator, the HR person. Those are
13 the administrative personnel inside the law firms, and Visualex
14 is not hired to consult with them on how to run their law
15 firms. Visualex has nothing to do with the management of the
16 general business operations of these firms.

17 In view of that, when you look at the discretion and
18 independent judgment prong of the administrative exemption
19 which follows, with respect to Ms. Kadden's role, it's even
20 more clear. Was Ms. Kadden exercising "discretion and
21 independent judgment with respect to matters of significance"
22 in the management or general business operations of Stroock
23 Stroock & Lavan, or was she assisting lawyers who had a client
24 going to trial? I think that a close look at the
25 administrative exemption regs makes all that clear, without

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Summation - Mr. Risk

1 even getting to the Second Circuit cases which support it,
2 including Davis v. JP Morgan, which is the one that most
3 recently affirms the production administration distinction and
4 says, we know modern businesses are not so simple anymore, they
5 are service businesses and we move the production
6 administration to those. I'll stop there. And I think the
7 regs are the answer.

8 Briefly, your Honor, on the liquidated damages, under
9 the FLSA, as your Honor knows, we are entitled to liquidated
10 damages. They are presumed. And they are not -- of course,
11 they mean something different in the state law than the federal
12 law. In the federal law they are not a penalty. They are
13 really an interest equivalent to make up for the time lost
14 without the money. So the presumption is that we are entitled
15 to it. I think it's the Barfield case in which Judge Raggi of
16 the Second Circuit says it most recently, most clearly, we are
17 supposed to get them. But your Honor has discretion not to
18 give them upon a showing of good faith and reasonable basis.

19 Let me just say that we heard that Ms. Romano did a
20 Google search. We heard Ms. Romano look at a DOL website. And
21 she concluded Kadden and others were exempt. She claimed that
22 was industry practice, somewhat ironically, because Ms. Romano
23 had a company for eight years paying overtime to all the
24 consultants. And odd testimony from her about what the
25 industry practice is. She e-mailed a friend who is an

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Summation - Mr. Risk

1 attorney. She sent to that attorney Exhibit 2, Kadden's job
2 description. You know what Exhibit 2 says. The lawyer
3 apparently agreed that Kadden was exempt, but Ms. Romano was
4 unable to recall which exemption or what theory, either from
5 her own research or from what counsel told her.

6 Apparently, counsel told Romano that she had spoken
7 with someone who had worked at the Department of Labor for 25
8 years. I guess it's federal, but maybe it's the New York State
9 Department of Labor, for many years, and that person had said
10 that Kadden was exempt. I don't know who that person is or
11 whether they ever saw the job description. Apparently, that
12 person never spoke to Romano directly and certainly did not
13 interview the employees. 25 years at the Department of Labor
14 is a commendable career worthy of our respect. But for what we
15 are doing here, 45 minutes with these regs would have been much
16 more useful.

17 The liquidated damages under the FLSA are not a
18 punishment. They are intended to make up the lost time without
19 the wages, which in this case has gotten to be a few years.

20 The halftime method is the last issue on the table,
21 your Honor. We have briefed it. It's technical. I remind the
22 Court that in this case we had a written agreement, Exhibit 3.
23 That clearly provided for the overtime. Couldn't have been
24 more clear. Exhibit 5, the pay stubs state the hourly rate at
25 36.04 or 36.06 and the overtime hourly rate 54.09, one and a

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1 half times. The hourly rate stayed on the pay stubs for the
2 remainder of Kadden's employment calculating her pay, vacation
3 time, sick time. That was always the hourly rate. It's ironic
4 to take someone who is getting \$54 in overtime, if the Court
5 were to conclude they are entitled to overtime, and then put it
6 back at only a third of that amount.

7 They didn't make an agreement with Kadden. The
8 testimony was quite clear. They called her in and said there
9 would be no more overtime.

10 Now, for people who like FLSA legal issues, it's a
11 lively issue, the halftime method and when it should be
12 applied, and Visualex is correct that under certain
13 circumstances it's been applied by the Second Circuit and
14 elsewhere. In the Perkins case, Perkins v. SNET, cited in our
15 brief, most recently was a really strong rejection of it across
16 the board by, I think it was Judge Hall in the District of
17 Connecticut. It's cited in my pretrial proof. That's taking
18 it on directly and in that case the Court in Connecticut
19 rejected the halftime method last year.

20 THE COURT: Do you remember the basis for that
21 rejection? What was it?

22 MR. RISK: Rejected it across the board.

23 THE COURT: It never applied?

24 MR. RISK: That was a really strong rejection. But,
25 first, your Honor, in Connecticut, the judge said, as many of

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Summation - Mr. Risk

1 these courts are saying, wait a minute, when it's in the
2 regulations, it's a method to pay overtime prospectively. If
3 you say to an employee when you hire them, I'm giving you
4 \$75,000, your hours are going to fluctuate and that's straight
5 time pay for your fluctuating hours, be they low or high, and
6 we are going to pay you a half premium, that's the halftime
7 method as imaged in the regulations.

8 So courts that rejected it say, the regulation is not
9 a remedy in a misclassification case at all. There is some
10 authority that skirts around, including the Seventh Circuit,
11 skirts around the regulation and says, in the Overnight Motor
12 case in 1942, it's applied without the regulation. The Seventh
13 Circuit accepted the analysis about the regs that I have
14 presented but said we can take authority directly from
15 Overnight Motor. It's not exactly clear when they would apply
16 that, but I think the notion still is where the employee had an
17 agreement or an understanding about what the straight time pay
18 would be.

19 And in this case, Ms. Kadden had a written agreement.
20 She had the pay stubs. She didn't make an agreement to change
21 her compensation. It just doesn't seem to me the worst
22 possible case to fit those facts. There seems to be no
23 rationale for application of the halftime method.

24 More broadly than that, this is the quintessential
25 remedial statute of the FLSA and the halftime method cuts the

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Summation - Mr. Risk

1 remedy by, you would think, by two-thirds. It's actually more
2 than two-thirds because it results in a recalculation of the
3 hourly rate. It cuts it to pieces. And so it seems an odd
4 application in a remedial statute unless the circumstances are
5 here.

6 The question I would be asking Visualex about the
7 halftime method is, where does their rationale end? If any
8 employer can call a salaried employee in and say, you are not
9 getting overtime, well, that employee, like Ms. Kadden -- Ms.
10 Kadden left the meeting with Ms. Romano, she had a clear
11 understanding she wasn't getting any more overtime. There was
12 no doubt about that. If that's all you need for the halftime
13 method, then it applies in every case where an employer says,
14 I'm telling you what you are getting, I'm breaking the law.

15 The question is, where would it not apply? It would
16 gut the remedial statute. By the way, to the extent it's
17 applied where there are -- the quintessence of it, is it's
18 employed with fixed salaries and up and down hours. There is
19 some aspect of that in this job, there is no doubt about that,
20 except that you heard the testimony, Visualex has office hours,
21 9 to 6 and there is a requirement of eight hours a day. And
22 Debbie Marshall, the bookkeeper, comes to Ms. Kadden and says,
23 you don't have 40 hours this week. What's wrong? What are you
24 going to put in? Did you have a sick day whatever it is? So
25 it's not really a fluctuating situation.

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Summation - Mr. Risk

1 I'll stop there, unless your Honor wants me to speak
2 about anything extra, because we have plenty of the Court's
3 time. I think that the regulations are a pretty good guide in
4 this case today, just as they were a year ago, and I think that
5 the reading of the regs that I hear from Visualex is a driveby
6 reading, a quick reading that relies on a word here and a word
7 here and it's not what they say. Thank you.

8 THE COURT: I'll find out more when I hear the defense
9 summation because as the trial evolved I am not so sure the
10 administrative exemption, after all, is the best for them. One
11 of the other two might be the one that they now focus on more.
12 We will see. If I have any more questions from you after that
13 I will come back to you.

14 MR. RISK: I hope it's not the creative exemption.

15 THE COURT: We will see. I don't know which one they
16 are going to really press the most on. Up until now the
17 position has sort of been, all three apply, that's that. You
18 would think they might have a priority order. This is our
19 favorite. If you don't find that, this is our second. If you
20 don't find it, this is our third. I'm hoping Ms. Klein tells
21 me that.

22 Ms. Klein.

23 MS. KLEIN: Your Honor, first of all, I also, just
24 like Mr. Risk, would like to thank you the Court for its
25 patience over the last couple of days. I know at times I have

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Summation - Ms. Klein

1 been agitated. I know at times I have been anxious, and I know
2 at times the Court has thought that I was acting as the judge
3 as opposed to just the advocate. And I want to express to the
4 Court and make sure the Court understands, there was never a
5 disrespect intended.

6 But what it was, it didn't come from a place of
7 disrespect. It came from a place of my gut. And I tell you
8 why. I take great pride in our profession. I take great pride
9 not in being a lawyer, but in justice. And what this case
10 comes down to is very, very simple. This is a matter of trying
11 to rewrite history. As Mr. Risk just made very, very clear to
12 us, Ms. Kadden came to him with a piece of paper and showed him
13 an offer letter. This case is not about a breach of contract,
14 this is not an unjust reliance or detrimental reliance. Yes,
15 he has a piece of paper that said to an at-will employee, this
16 is the compensation that I am going to give you.

17 THE COURT: Of course, it said the overtime thing.

18 MS. KLEIN: It's never been a dispute and there is
19 also no dispute that the Department of Labor and the federal
20 and the state laws allow an exempt employee to receive
21 overtime. That's okay. It's bonus money. You are allowed, if
22 you are so kind and wanting to as an employer, to share wealth
23 and give money, you are allowed to. And it doesn't make you
24 obligated for life. It doesn't mean that somebody who is in an
25 exempt position all of a sudden magically transforms into a

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Summation - Ms. Klein

1 nonexempt employee. And that's what, I really believe in my
2 heart, is what started this case.

3 Ms. Kadden, she worked as a graphic consultant before.
4 She didn't get overtime there. She didn't sue them for not
5 getting overtime. She did the exact same job that she did
6 here. She admitted at her deposition that she worked in teams
7 there. She represented on her résumé, just like she said at
8 her deposition, what the primary job was, to create persuasive
9 graphics, to give -- I'm sorry. I believe it was help
10 attorneys develop trial strategies. She is a critical thinker.

11 THE COURT: Would that put you in the greatest
12 exemption? Which of these three boxes does this argument put
13 you in?

14 MS. KLEIN: It actually falls under them. I will get
15 to that. I know your Honor indicated just a couple of minutes
16 ago, it would have been helpful to the Court if we prioritized.

17 THE COURT: I want to know what your strongest
18 argument is.

19 MS. KLEIN: It's not a stronger argument. The
20 Department of Labor has made very clear, you don't fall
21 necessarily into one, two, or three. You in fact can fulfill
22 parts of one, parts of two, and none completely, and you are
23 exempt.

24 THE COURT: Would you run that past me again. You
25 cannot be qualified under any exemption yet be exempt?

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Summation - Ms. Klein

1 MS. KLEIN: No. For example, you have, let's say, the
2 criteria for each one, right.

3 THE COURT: Yes.

4 MS. KLEIN: The full puzzle, I'll call it. You can
5 satisfy portions of one, portions of another one, none of them
6 completely, and you are still exempt under the law. It's
7 called a combination exemption and it's in our brief. So you
8 don't have to just say I am an administrative --

9 THE COURT: I didn't recall that. There is a new one
10 called the combination --

11 MS. KLEIN: It has always been.

12 THE COURT: It's a new one for these oral arguments.
13 I had not heard it in oral argument. You said it's in your
14 brief, I appreciate that. I don't remember every brief I read.
15 It wasn't in the oral argument Monday.

16 MS. KLEIN: It is in the brief and it, of course, very
17 important because our burden is not to prove that she matches
18 one perfectly.

19 What this case is about, let's not lose sight of --

20 THE COURT: How do I read about the combination
21 exemption? Is that in the regs?

22 MS. KLEIN: It's right in the regs and it's in our
23 brief and we can give you the section.

24 THE COURT: Give me the section.

25 MS. KLEIN: I can get a copy.

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Summation - Ms. Klein

1 THE COURT: I would like to read about the combination
2 exemption.

3 You didn't comment on that at all, Mr. Risk.

4 MR. RISK: No, I didn't, your Honor.

5 MS. KLEIN: Should I continue and give you a copy of
6 it?

7 THE COURT: No. I'll wait. Do you have it, Mr. Risk?

8 MR. RISK: I am looking for the section of the regs --

9 THE COURT: Good.

10 If she doesn't meet any of these three exemptions she
11 is still exempt.

12 MS. KLEIN: If she qualifies --

13 THE COURT: That sounds very amorphous.

14 MS. KLEIN: I know the Court understands what the
15 history of the FLSA is and when it went in, and it was passed
16 in 1939, why it is so important and it is an inherent part of
17 understanding and interpreting the statute, and I think that
18 that was most recently made clear in Christopher v. SmithKlein
19 Beecham. It is not a rigid statute. The FLSA was passed to
20 make sure that the lowest earning members of our society are
21 not paid at a level that's below one that people can live at.
22 I did --

23 THE COURT: It's true that the exemptions are to be
24 construed narrowly. Courts have said that.

25 MS. KLEIN: Interestingly referred and relied on and I

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Summation - Ms. Klein

1 believe the Second Circuit Mr. Risk recently mentioned, and we
2 also know the Second Circuit was just reversed by the Supreme
3 Court of the United States because of its finding that it
4 applied too rigid of an application. This is a statute that is
5 meant --

6 THE COURT: Which case was that? That's Christopher?

7 MS. KLEIN: Yes.

8 THE COURT: That's the one where the Second Circuit
9 was reversed?

10 MS. KLEIN: Yes. There was a split among all of the
11 circuits. In that case it's interesting, and I think what it's
12 going to be known for and remembered most for is not per se the
13 exemption that was being analyzed in that case. I am sure your
14 Honor knows that case dealt with pharmaceutical sales reps who
15 would work for the pharmaceutical companies and they would go
16 to doctors offices and knock on the doors and have meetings
17 with them and befriend them and they would just drop samples
18 off. The goal of it was to try to encourage these doctors that
19 whenever they were writing a prescription that they would write
20 the prescription with the medicine that was produced by their
21 company. But there was never actually a transaction, a sales
22 transaction, because it's unlawful to sell drugs in that type
23 of situation.

24 When the Second Circuit and the other courts had
25 opportunity, the ones that declined to find that the sales reps

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1 were exempt, they were focusing and looking in the very exact
2 language that was written in the statute. And historically in
3 the industry those people, the sales reps, were considered
4 outside salesmen and there is an outside salesmen exemption, as
5 the Court knows.

6 And the Second Circuit rightly so, if literally
7 reading verbatim the statute, turned around and said, no, there
8 is no sale. If you don't have a sale, how can somebody be
9 exempt as an outside salesperson? They are not selling
10 anything. And ultimately when it made its way to the Supreme
11 Court of the United States, the issue, because there were class
12 actions brought all over the United States, it opened up a
13 flood of discovery, which I think this case will do the same
14 thing in the world of trial graphics. And what the Supreme
15 Court said is, we cannot be so rigid and not think about how
16 the world has evolved. Sales transactions don't happen the
17 same way. What is the intent and the purpose behind this? And
18 really incredibly what the Supreme Court said was, forget about
19 outside sales, this, that, or the other.

20 The FLSA was not meant to cover people like these
21 sales reps. The particular plaintiffs in the case that made it
22 up to the Supreme Court of the United States had an annualized
23 salary of \$70,000. The Supreme Court said, no way is that
24 meant to be covered by the statute. In this case, Ms. Kadden
25 earned at a minimum \$75,000 a year.

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Summation - Ms. Klein

1 When we think about it, what is a professional? Your
2 Honor, you are a very brilliant woman. I know your background.
3 I admire you. We know an exempt employee when we see one
4 without necessarily labeling. The regs and the statutes
5 consider that somebody can't be exempt if they make less than
6 \$455 a week. Ms. Kadden made \$1500 a week.

7 THE COURT: Say that again. The 455, what was that?

8 MS. KLEIN: \$455 a week is the lowest level for
9 somebody that can never be found exempt. She made three times
10 that amount. She made --

11 THE COURT: There is no high end cutoff either. If
12 you make more than X, you can never be nonexempt, right?

13 MS. KLEIN: No. But what they indicated and when you
14 look at the legislative history and the readings on the floor
15 when the bill was being passed, again, it was the concern that
16 there would be individuals that just say, and I use this not as
17 a section of the reg but label people professionals.

18 And the concern was that you would take somebody who
19 was getting an hourly rate and just say, oh, they are
20 professional because like your Honor said the other day,
21 everybody is professional. Of course, that's not the way that
22 they are using the word professional. It's not meant as a
23 derogatory comment about someone who does it. Most nonexempt
24 employees are very professional and do their jobs very well.

25 But in this context of the law the question is, is

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1 somebody treated like a professional? That's what you are
2 really supposed to look at. What are they paid? Are they paid
3 near the baseline of \$7.25 an hour? The minimum hourly wage is
4 \$7.25 an hour.

5 Do you want to hear an amazing statistic? If you took
6 a wage earner that earns the minimum wage in the United States
7 and they worked 24 hours a day, seven days a week, 365 days a
8 year, they would earn approximately \$63,000, still far less,
9 \$15,000 less than Ms. Kadden, who I promise you did not work
10 seven days a week, 24 hours a day.

11 Again, why is this important? It's important in
12 understanding that we don't look at the regs like they don't
13 matter. We have to remember what they are and what their
14 purpose is.

15 I'm sorry, but this case makes me think of the famous,
16 famous line from Justice Potter Stewart. I can't define
17 pornography, but I know it when I see it. And that's what this
18 is about.

19 You know what. I look at Ms. Kadden's résumé and what
20 the Cowen Group said about her and the job she was hired for,
21 right. She consulted. A typical day for Adina involved
22 identifying strategic areas of concern in major litigation,
23 conducting extensive research to develop case theories,
24 developing and implementing demonstrative graphics to aid and
25 educating jurors on subject matters, managing work flow of a

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1 team of consultants. She has represented herself as a
2 professional.

3 THE COURT: That may be. I am just trying to
4 understand the word professional fitting into the regs.
5 Creative professional is one exemption that I knew about.

6 MS. KLEIN: The learned professional.

7 THE COURT: I understand. I never saw just
8 professional. That's why I asked which of these exemptions do
9 you want to focus on. Then you said, I don't have to, you said
10 there is this thing called a combination exemption. Ten
11 minutes ago I said, can you hand me that combination exemption
12 so I can look at it.

13 MS. KLEIN: The combination exemption falls under 29
14 CFR Section 541.708.

15 THE COURT: I think I'm being handed a copy of it.
16 I'll just read it. It's short. Employees who perform a
17 combination of exempt duties, as set forth in the regs in this
18 part for executive administrative professional outside sales
19 and computer employees, may qualify for exemption. Thus, for
20 example, an employee whose primary duty involves a combination
21 of exempt administrative and exempt executive work may qualify
22 for exemption. In other words, work that is exempt under one
23 section of this part may not defeat the exemption under any
24 other section.

25 What does that mean? Work that is exempt under one

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1 section will not defeat the exemption under any other section.
2 That's weird.

3 MS. KLEIN: Your Honor, the FLSA has never written in
4 very clear language and I think that's why there has always
5 been difficulty. The regs have helped to some degree in
6 defining them.

7 There is very little case law really talking
8 specifically about them other than the regs themselves.
9 Everyone sort of cites back to the combination reg and talks
10 about it.

11 One case that is interesting and one of the few is
12 Schmidt v. Eagle Waste & Recycling, which is 599 F.3d 626,
13 which is the Seventh Circuit Court of Appeals. And in that
14 case they held: We also agree with the district court that
15 even if Schmidt did not qualify for the outside salesperson
16 exemption on its own, she would fall within the, quote,
17 combination exemption to the FLSA. Employees, quote, who
18 perform a combination of exempted duties as set forth -- I'm
19 sorry -- I'm sorry, your Honor. I'm reading from my BlackBerry
20 and I just lost that section. I'm sorry.

21 Then they cite the section. It says: Eagle argues
22 that to the extent Schmidt performed duties unrelated to
23 outside sales, these were largely exempt, quote, administrative
24 duties with all of the citations to the regs. With the
25 exception of her first few months of employment, Schmidt's base

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1 salary exceeded the \$455 per week minimum.

2 When Schmidt was not actively pursuing sales, she
3 developed advertising and marketing plans, managed customer
4 complaints, administered the customer database, and dealt with
5 issues that would have been handled by Albi, that was somebody
6 else, there, had he been in the office, such as approving an
7 order of parts for broken machinery. This office work was
8 directly related to the management and general business
9 operations of Eagle. It goes on to ultimately conclude that a
10 combination of these things meant that the person was exempt
11 under the combination exemption.

12 What's very interesting, I think, that's come out from
13 the trial in the last two days is based on what Ms. Kadden
14 testified, and I totally do not believe that her testimony is
15 worthy of credibility about what her job is, and the reason I
16 say that is because the résumé that she most currently had used
17 represented that she was a consultant doing exactly what all of
18 our witnesses said a graphic consultant does. And surely if
19 she wasn't a graphic consultant, but she was simply a
20 coordinator or a proofreader, she would describe herself as
21 that.

22 You can't have it both ways. You can't represent to
23 the world you are one thing. I could easily describe my work,
24 my daily work as proofing. She didn't bill as proofing. She
25 chose to charge Visualex's client under the consulting rate

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1 when she was not proofing as a consultant, she knew to not
2 record it that way, and she put that as project management. So
3 she herself decided when she was doing consulting work.

4 A lot of people can say, you know, Ms. Klein, what's
5 the primary duties of an attorney? You know what, if I thought
6 of the mundane crap that I have to do every day and the amount
7 of editing, reading, and proofing and answering emails, not
8 giving advice, doing things, you know what, I think that I am
9 entitled to overtime. I am sure the Court would feel the same
10 way. And Mr. Risk makes a big thing --

11 THE COURT: I'll do without the overtime. I just like
12 the living wage.

13 MS. KLEIN: I think if we took my hours and divided
14 them into the rate, I also am not. I am with you.

15 THE COURT: I've done that. Put it in an opinion
16 once. It was not pretty.

17 MS. KLEIN: And the other thing.

18 THE COURT: I think it was approximately \$30 an hour.

19 MS. KLEIN: I couldn't agree more. Listen. There is
20 a lot that needs to be done in our society, and there is no
21 qualm for me about that. I absolutely believe that everybody
22 is entitled to minimum wage, that they are entitled to time and
23 a half. But those statutes are meant for people that are
24 walking around like robots. I hate to say it, but their job is
25 really manual. They are being told what to do. They are not

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1 thinking. They are not being creative in doing their job. Not
2 that they don't think. Of course, they are human beings. They
3 think, they have feelings. But that is very different than
4 somebody that can choose to come in when they want.

5 Now, Mr. Risk seems to make a very big thing
6 throughout this litigation, especially these last two days,
7 Visualex wanted Ms. Kadden to be at work at 9:00. Oh, I'm
8 assuming that your law clerk is expected to be here at a
9 certain hour on days because this court is open and it has a
10 business. That does not make somebody nonexempt. A doctor is
11 scheduled for a surgery at 9:30. Would you expect him to be
12 there? And the fact that he is told to report at 9:30, does
13 that make him nonexempt? It is professional and when a
14 business' doors are opened it is expected that other business
15 taking you away from the office would expect that you would be
16 there. He tries to make it sound like that is some horrible
17 thing that should control this case.

18 The one thing I didn't hear very much in this case,
19 what does a primary consultant do? When I say that I didn't
20 hear it, I didn't hear it from the plaintiff. Interestingly,
21 in all of her questions from her counsel, it was focused on the
22 minute -- again, if you focused on what I do, you would be
23 convinced that I am not an attorney, that I don't exercise
24 thought and discretion, that I don't have to creatively come up
25 with arguments. The same thing could be said for Ms. Thering,

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1 an associate at my firm. You know what, she doesn't go to
2 client meetings. She doesn't interact face to face. She is
3 there all hours of the night doing research and checking and
4 proofing. Is she also nonexempt?

5 Because Ms. Kadden would like you to think, just
6 because maybe there is a named partner or there is somebody
7 that's the partner or that has more experience than you, it
8 makes her not a professional.

9 Well, interestingly, if she wasn't a professional, why
10 was she being paid as a professional?

11 THE COURT: I understand that whole argument. But the
12 problem is with the phrase, a professional, because you are
13 arguing that any professional is exempt. I don't see that
14 exemption called a professional exemption.

15 MS. KLEIN: There is the professional exemption.

16 THE COURT: Where is that one? We have not been
17 talking about it. We have talking about the creative
18 professional, the learned professional, and then your
19 combination thing, but I have not seen the one called all
20 professionals are exempt.

21 MS. KLEIN: That's the history of the statute and
22 everything behind these. And then you get --

23 THE COURT: You are arguing generalities. I don't go
24 to legislative history until I have to. That's the rule. You
25 don't do it.

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1 MS. KLEIN: Yes. If we go through these, and I'm
2 happy to address all of them separately again, although the
3 combination applies.

4 Getting back, we will talk about the administrative
5 exemption. As the Court knows, the employee must be
6 compensated on a salary of not less than \$455 a week, no
7 dispute there. The parties agree. Ms. Kadden has also agreed
8 that we have met the element of showing that she received that
9 salary all the time. Her salary was not subject to deductions,
10 whether she worked 34 hours, whether she worked 23 hours,
11 whether she worked 40 hours. She got the same paycheck,
12 baseline paycheck every week.

13 The next thing is, under the administrative exemption
14 the employee's primary duty must be the performance of office
15 or nonmanual work directly related to the management or general
16 business operations of the employer or the employer's
17 customers. And the employee's primary duty includes the
18 exercise of discretion and independent judgment with respect to
19 matters of significance.

20 What I was just starting to say before was, you know,
21 having heard Ms. Kadden's testimony here, I think I guess my
22 thought process changed a little from how I was thinking
23 throughout this entire case. For me there has never been a
24 question that a graphic consultant of what that job means at
25 Visualex is exempt for many reasons, because of a variety of

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1 things. In the case of, for example, the consultants, we know,
2 based on the Department of Labor regulations, that consultants,
3 people that render advice, are exempt. They specifically say
4 that. We also know that you don't have to be the lead
5 consultant for that to be the case. You can have tax advisors,
6 financial advisors, and there are groups of them that are
7 working in the office independently thinking, and they also are
8 exempt.

9 And we were always focusing on the administrative
10 exemption, on the fact that as the consultant she is exempt.
11 Also, that she did work on her primary duty that related to our
12 customers, the clients of Visualex.

13 We heard Mr. Daignault say that he relies on the
14 Visualex consultants, they make them better lawyers. They are
15 helping them. It's no different than when you bring in an
16 image consultant. How do you improve the visibility of a
17 company? How do you make it more desirable?

18 THE COURT: That does seem to me to be the general
19 business operation of the company employed.

20 MS. KLEIN: Isn't the general business operations of a
21 law firm --

22 THE COURT: To do a trial presentation, no.

23 MS. KLEIN: No. The general business is providing
24 legal services. If they are able to improve their legal
25 services by having consultants have them come in and help them

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1 explain --

2 THE COURT: That's not what I think is the
3 administrative exemption is. Let's why I asked you to focus on
4 your favorite. I no longer see that as applied by its plain
5 language. That's not running the business of the law firm.
6 You want to try a case, you have to hire an expert witness,
7 too. If you expert witnesses that are a contractor, that may
8 improve your presentation. It may help you win the case and
9 win a \$100 million verdict. That expert witness on some patent
10 issue is not running the general business of the company.

11 MS. KLEIN: Your Honor, I respectfully disagree.
12 According to the Department of Labor, if an investment
13 brokerage firms hires somebody to come in and help them figure
14 out how to get a better deal in purchasing a competitor, that
15 person is specifically identified as exempt, as the consultant.
16 In fact, the Department of Labor --

17 THE COURT: That happens to be a different example
18 than the one I chose or than the one you are arguing. It won't
19 pay us to go through these examples. It's a difficult thing to
20 categorize every business relationship to try to put it in a
21 box.

22 MS. KLEIN: I think that's why I am suggesting to the
23 Court that it's so important to really understand and feel what
24 the Supreme Court has just made clear, again, that it is not a
25 literal-only reading. You look at things, for example, which

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Summation - Ms. Klein

1 is what they just said in the Supreme Court when the statute
2 uses and the regs use words like includes but is not limited
3 to, which is right in the statute that we were talking about.

4 THE COURT: I have yet to see a case that didn't have
5 it, includes but is not limited to.

6 MS. KLEIN: A statute that didn't have that.

7 THE COURT: They all have it. That's a very common
8 phrase in the law. Every contract has it. Many regs have it.
9 It's construed a lot.

10 MS. KLEIN: I am not disputing it, but I think it's
11 important in the context of what the Supreme Court has just
12 said, which is that, again, that's indicative that it is a
13 statute or a reg that's meant to be applied in today's real
14 world, that you look at what it is.

15 THE COURT: Your general argument is certainly
16 contrary to the notion that the exemptions are narrowly
17 construed. You give them the broadest possible construction
18 and essentially say anybody highly educated, anybody who is not
19 a manual laborer or anybody earning over the minimum wage,
20 these people should not be nonexempt. They shouldn't be
21 getting overtime. It's a very broad argument you are making
22 and I'm afraid of that. If I bought your argument hook, line,
23 and sinker, there goes my next 20 cases. Basically you are
24 saying all the professionals are out just by virtue of being a
25 professional. I have a lot of FLSA cases.

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Summation - Ms. Klein

1 MS. KLEIN: I notice you've had a lot recently. There
2 is a lot of implications. Also, there is a huge implication
3 for the industry. As we heard --

4 THE COURT: This is a narrow industry compared to some
5 other cases I have.

6 MS. KLEIN: Absolutely, relatively speaking to some
7 others.

8 There is other huge implications. If the Court were
9 to ultimately conclude that litigation graphic consultants,
10 most of them with highly advanced degrees, are meant to be
11 nonexempt employees, the interesting thing is, you will see
12 salaries of the 75,000 go to where they should, nonexempt
13 employees receive \$35,000 a year. One has to be careful what
14 they wish for.

15 THE COURT: I've thought of that in this case.

16 MS. KLEIN: That's fine. If Ms. Kadden wants to be,
17 if she was doing what she says she was doing, acting like a
18 robot, just following direction like a waitress, takes an
19 order, gives it to the chef, takes an order, then shame on us
20 and shame on her. She should not have told us she was acting
21 as a consultant. She should not have asked for \$75,000 a year.
22 She should not have misrepresented on her time records what she
23 was doing and stolen from clients that paid bills. I mean,
24 it's just not fair.

25 And when we get back to how I opened, about being

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Summation - Ms. Klein

1 agitated, it's not fair. You cannot expect somebody who got
2 paid that and then come in and say, oh, no, no, no, I didn't
3 really do anything, I wasn't thinking, I wasn't being creative,
4 I wasn't imaging anything. I was just looking down. And we
5 heard, she claims she only was entitled to do anything when
6 Lillian was out of the office because of a death in her family
7 or back surgery. Really? Because we understood --

8 THE COURT: I think she was trying to say, she wasn't
9 the ultimate decision maker and that's true in a law firm, too.
10 Junior associate is not going to make any final decisions
11 unless you're completely unavailable.

12 MS. KLEIN: She actually did make final decisions when
13 Ms. Romano was in the office.

14 THE COURT: On some level. You know what I'm saying.
15 The ultimate decision maker is the senior partner. You're used
16 to that.

17 You've had a lot of time. Is there anything you want
18 to cover that you have not?

19 MS. KLEIN: Your Honor, there is unfortunately, I
20 guess, for you, there are other things that I --

21 THE COURT: We got to move to them quickly. Now I'm
22 in a time bind.

23 MS. KLEIN: Your Honor, I think we need to look at all
24 of the things. As I talked about, I don't think that we can
25 look at it so narrowly and rigidly. But if you are going to do

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1 that, again, I think that the fact that she was a consultant
2 and if she was doing the job --

3 THE COURT: Remember the word consultant is just a
4 title and we don't decide a case based on a title. I'm not so
5 interested in her being a consultant, but rather what she did.

6 MS. KLEIN: That's right. And what the job was that
7 she was hired to do and what she was expected to do. And we
8 know very clearly from the case law and from the regs that just
9 because somebody is not possibly good at their job and not
10 doing their job, that doesn't make them become nonexempt.

11 THE COURT: I got that. Can we move on.

12 If you want to cover the halftime argument, go for it.
13 If you want to cover the liquidated damages, go for it. Those
14 are the only two. I have got your argument on the exemption.

15 MS. KLEIN: Your Honor, can I just address the
16 creative exemption, please. Thank you.

17 The creative. It seems like there has been a lot made
18 of, she was not a graphic artist. The interesting thing is, a
19 graphic artist, not the graphic artist title at Visualex, they
20 are nonexempt employees. They are not exempt. They do not
21 fall under the creative.

22 Why don't they fall under the creative? Because they
23 don't imagine what they are making. They are told, like the
24 Salvador Dali example we were given, they are told by Ms.
25 Kadden what to do. She creates it in her head, is this

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1 working, is this best visually depicted? The complex
2 information that I have read doesn't work with what we are
3 trying to do for the client. And she simply goes up to them
4 and tells them what to do and they are the production workers.
5 They make it.

6 What is she more comparative to? She and the graphic
7 consultant -- let's not just talk about her -- they are the
8 equivalent of the executive chef and the line cooks. If the
9 executive chef decides, what is it we want to create? He
10 decides or she decides, what are we going to serve for dinner?
11 What is the plate going to look like when it comes out? The
12 line cooks take the creation and the imagination --

13 THE COURT: I understand. They execute it. Can we go
14 on past the exemptions and get to the remaining two issues,
15 liquidated damages and halftime if you wish to, very briefly.

16 MS. KLEIN: In regards to the liquidated damages,
17 contrary to what Mr. Risk said, especially the New York
18 provision is actually a penalty. It says it right in the
19 statute.

20 THE COURT: That's the New York Labor Law. Under the
21 FLSA?

22 MS. KLEIN: With regards to the federal, I would plead
23 with the Court that this is not a case that liquidated damages
24 should ever be granted. This is an industry that for 25, 35
25 years, I think we heard the industry, that has never had a

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Summation - Ms. Klein

1 reason to think that people that do the jobs of not just the
2 title but actually do the job of graphic consultants, that they
3 were not exempt employees.

4 Mr. Risk sort of plays piddly piddly with what Ms.
5 Romano did, the steps that she took. She went on a Google
6 search. She did that and she went to the Department of Labor.
7 She reached out to a lawyer. Should she be not entitled to
8 fairness because she called somebody who she knows? The fact
9 that he has brought up that I know Ms. Romano is meaningless,
10 does that mean that I can't render --

11 THE COURT: Don't waste time with that. You're a
12 lawyer. She consulted you. Okay.

13 MS. KLEIN: Not only did she consult with me, but, in
14 fact, because I understand that the FLSA is one that courts
15 struggle with all the time because of how unclear these regs
16 are, I did go one step further and I went to somebody who was a
17 prosecutor for the United States Department of Labor, and he
18 assured me, based on an explicit understanding of what they do
19 on a daily basis, that she was exempt under the three that we
20 have advanced, as well as the combination exemption.

21 The other thing he made clear, and we have pointed out
22 in our briefs, is, it is incorrect to think that because
23 Heather Moran was hired that the professional exemption, the
24 learned exemption does not apply. What matters is why Ms.
25 Kadden was hired. It's specific. And I won't waste the

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1 Court's time but simply to cite to the examples in the reg
2 about the paralegal. Paralegals are generally nonexempt.
3 However, a paralegal that's hired because he has an engineering
4 background is exempt. It doesn't apply across the board.
5 Again, Heather Moran was the one out of 25 years that
6 Ms. Romano was desperate and tried and didn't work. I don't
7 think that can be held against her.

8 Your Honor, in summing up --

9 THE COURT: I think you have covered liquidated
10 damages. How about the halftime?

11 MS. KLEIN: The halftime method, your Honor, first of
12 all, I would hope that we would never, never get there.
13 However, if we were going to get there, if the Court was so
14 inclined, what I would say is, it's nice that Mr. Risk is
15 pointing the Court we are relying on a District Court of
16 Connecticut. With no disrespect to the District of
17 Connecticut, but there are numerous circuit courts that have
18 already decided this and the federal Department of Labor, which
19 said, in a misclassification case, it is absolutely appropriate
20 to use the halftime method.

21 We heard testimony from Ms. Kadden. She understood
22 that as of April 1, she was told that the \$75,000 was going to
23 compensate her for all her work. She didn't dispute that. If
24 she didn't like that, she could have left. She was an at-will
25 employee. She stayed for another two years.

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1 Interestingly, also, if she wasn't doing the job that
2 she was hired to do and which she was told on these job
3 descriptions where it says we specialize in providing analytic
4 graphics, our litigation graphic consultants help attorneys
5 develop persuasive visual presentations, if she wasn't doing
6 that, doesn't one have to scratch their head and say, really,
7 she is a smart intelligent woman. Why didn't she leave? If I
8 was hired to do something and I was hired to be a consultant
9 and I was being given proofreading work, as you and I
10 understand proofreading work in a word processing department,
11 you know what, I would quit or I would voice my objection. I
12 wouldn't sit there for three years. That's simply just not
13 credible. She was doing what a consultant does.

14 THE COURT: I'm sorry. You lost me on the halftime
15 thing.

16 MS. KLEIN: Going back to the halftime, the Department
17 of Labor has said that that is the appropriate method to use in
18 a misclassification case. She admitted, Ms. Kadden, that she
19 knew the \$75,000 was from April 1, 2009 forward to cover her
20 for all hours worked. Her base salary didn't decrease from
21 that point, so she doesn't lose the exemption.

22 THE COURT: Was Judge Hall wrong --

23 MS. KLEIN: I believe he was absolutely wrong.

24 THE COURT: Have you happened to read that particular
25 case?

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Summation - Ms. Klein

1 MS. KLEIN: I have. I don't remember the specific as
2 we sit here today. But the concept behind the halftime, my
3 understanding of what the rationale by the Department of Labor
4 and all of the circumstance courts is the following.

5 If I, as your employer, you're an at-will employee,
6 say I am going to compensate you in this case \$75,000 a year
7 for all hours worked in the year, and you stay there and you
8 are working, the understanding, if you end up being
9 misclassified and you should have been nonexempt later on, is
10 that all of the money that was paid is -- first of all, it was
11 understood that that was to cover you for all your regular
12 hours. So you have been paid your regular hours and Mr. Risk
13 is correct. It fluctuates, depending on the hours of that
14 week.

15 Again, there is no doubt that the law is very clear in
16 this area. You can have somebody, so long as their hourly rate
17 doesn't dip below the minimum wage, based on the hours they
18 worked in that week, that it doesn't bring them down below
19 that, in which in this case it doesn't. She was paid four
20 times or five times the amount of minimum wage. Even if you
21 divide every single hour that she actually worked, everything
22 from the beginning, into her salary for the three years, she
23 still made five times the minimum wage. So it doesn't dip. If
24 she has already been compensated for her straight time, the
25 only argument that could be put forth is that if she is out of

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Summation - Ms. Klein

1 pocket if she was misclassified is the halftime portion.

2 One last thing that I would like to bring to the
3 Court's attention is that in a circumstance like this, where
4 you have an employee that was treated as a professional, her
5 salary was never reduced, she came and went to the office as
6 she wanted, she exercised discretion and judgment in
7 interacting with clients and responding to e-mails and things
8 of that sort, what I would say is, fairness and justice, not
9 only from a due process standpoint, because of the fact that
10 never has there been anything issued from the Department of
11 Labor or any prosecutions brought by them against trial graphic
12 consultants, and they are very familiar with them, to suggest
13 this is an improper practice that's been going on. There is
14 nothing.

15 And if the Court is now going to decide for the first
16 time, when nobody in the industry has had notice about this,
17 there is due process issues, a business has the right to rely
18 on statutes and to understand what it is to be a professional.
19 And if we are going to find that she was misclassified, not
20 only would I urge the Court that liquidated damages isn't
21 correct, but I would also urge the Court that the halftime
22 method is correct, and that we have to go one step further and
23 that there should be the equivalent of an offset.

24 I can't ask for the salary back. \$75,000 is what she
25 was paid. Of course she wouldn't have been paid that if she

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Summation - Ms. Klein

1 was a nonexempt. However, there is no doubt that she should
2 not get a windfall. And we have not great records, because she
3 didn't keep them from every single day, but we have her own
4 handwritten records when she came in late. She admits and
5 concedes that only the exempt employees got comp time, that
6 other nonexempts didn't get that. The perks, again, it's not
7 that much.

8 At the end of the day, you know what, \$5,000 or \$4,000
9 to a small tiny company like Visualex is a lot. And we started
10 this trial, I don't know if your Honor remembers, you looked at
11 me and you looked quite angry at me as you have several times
12 during this case and said, why hasn't this case settled? Did I
13 not send you to a magistrate? The implication -- I'm not
14 saying these were your words -- this is ridiculous, this is
15 such a small amount of money, you know what I would say, your
16 Honor, I don't know if you have ever been sued. But if you've
17 been sued and you didn't do something wrong, I don't know that
18 you would put your hand in your pocket and pay somebody \$10,000
19 or 20,000 or 30,000. It will change everything.

20 We have every consultant that's ever been hired, we
21 have employees that currently work, not only consultants. We
22 have art directors that manage and exercise the same
23 discretion. It changes everything. And this case is not
24 about, unfortunately, the money because you know what, the
25 money that Visualex has had to pay is unbelievable. It will

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Summation - Ms. Klein

1 damage them and harm them for years. But it's also something
2 that they cannot just roll over. This isn't like something
3 which, oh, it's a one off and we can just have a nonadmission.
4 You can't. It changes the entire industry.

5 Your Honor, with all due respect, first of all, I
6 would like to thank the Court. I appreciate the time that
7 you've given us and I truly urge the Court to think and look at
8 the statutes and what they were meant for and to look at Ms.
9 Kadden, being a lawyer, that role she was hired to do, what she
10 was doing. I believe when that's done, the only fair and
11 rational conclusion is that she was meant to be an exempt
12 employee under these statutes. Thank you.

13 THE COURT: Thank you. Ms. Klein.

14 MR. RISK: May I have a minute or less?

15 THE COURT: Really. If you really stick to that.

16 MR. RISK: 90 seconds or less.

17 THE COURT: I'm looking at the clock.

18 MR. RISK: This case is not about the industry, other
19 companies. It's about what Ms. Kadden's job was at Visualex.
20 I don't think there is any such thing as a litigation graphics
21 consultant. Lo and behold, Mr. Mykel has a different title in
22 capital letters on his page and has testified that he had a
23 different title. That's that.

24 The SmithKlein case, it doesn't reverse settled law
25 about how the FLSA is construed. It's about construction of

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Rebuttal - Mr. Risk

1 the statutory term sales, not surprising that an employer is
2 going to be making this argument. I think that's been fully
3 dealt with.

4 Ms. Kadden's \$75,000 should be seen in the context of
5 the rest of her job, \$75,000 with no benefits.

6 THE COURT: What do you mean, no benefits?

7 MR. RISK: Health insurance that is \$400 that they
8 paid half of, and two weeks vacation. In the SmithKlein case,
9 for example, the \$70,000 marketing reps also had a significant
10 incentive compensation plan.

11 The combination method, your Honor, that your Honor
12 inquired about, I think it's meant to take exempt duties from
13 two categories and put them together to add up to over 50
14 percent. Here we have no exempt duties because she can't meet
15 the threshold under any of these things. That I think is what
16 the combination method is for, is to make the primary duty, to
17 get enough duties to make a primary duty of various exempt
18 duties.

19 To end with a small flourish, your Honor, I heard in
20 Visualex's case that Potter Steward knows a professional when
21 he sees one, our case is that Potter Stewart, if he was here,
22 would say, I know a learned professional, a creative
23 professional and an administrative employee when I see the regs
24 and the statutes and the cases. Thank you.

25 MS. KLEIN: I promise less than 60 seconds?

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1 THE COURT: What is it you want to say?

2 MS. KLEIN: Two things.

3 Mr. Risk just mentioned about the primary duties and
4 the combinations. Just to be clear, the CFR of the regs say
5 that you don't have to be doing the, quote, primary job more
6 than 50 percent of the time. You could do it less than 50
7 percent if you're still exempt. Again, she has acknowledged
8 what her primary job was as a consultant and that's what
9 matters, even if it was 30 percent, although her own time
10 sheets show she did consulting 80 percent of the time. That's
11 the first thing.

12 The second thing, your Honor, is, in regards to the
13 administrative exemption, if you listen to what Ms. Kadden
14 said, that really her job was to just, as we started saying
15 before, take the order from the client and just give the order
16 to the graphic artists, well, then, in fact, she actually
17 clearly fits 100 percent into the administrative exemption
18 because she was helping Visualex with the administration and
19 running of their business, which was to get the demonstrative
20 exhibits produced. So, in fact, her own testimony puts her
21 square within the exemption. On the testimony here, no less on
22 what the consultant job is.

23 THE COURT: Thank you.

24 When am I going to get the posttrial submissions?
25 They are pretty lean. I think I set a schedule.

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1 MR. RISK: We talked about it, your Honor. It kind of
2 depends on when the transcript would be available. I think we
3 are prepared to do it after the transcript is available. It
4 would help me if your Honor would let me know what --

5 THE COURT: I thought you were going to annotate the
6 proposed findings of fact and conclusions of law to the actual
7 snippets or the transcript pages that support the proposed
8 findings.

9 MR. RISK: That's fine.

10 THE COURT: That's what we talked about and I think
11 maybe some other case -- we talked about like ten days or
12 something.

13 MR. RISK: Yes. We can't start until we get the
14 transcript.

15 THE COURT: Depends on the method of ordering which is
16 a matter of money. Super fast cost super much.

17 MR. RISK: Is this a date that we need to set right
18 now, your Honor? Can we let you know?

19 THE COURT: I don't want to let it linger. I have a
20 big FLSA case. This better be out first.

21 MR. RISK: I assume we will get the transcript in a
22 weekish.

23 THE COURT: Depends how you order. If you order the
24 slowish method, three or four weeks.

25 MR. RISK: We won't do that.

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1 MS. KLEIN: We have resource issues on this side.

2 Your Honor, may I ask for clarification on one thing.

3 Is it going to be limited to just annotating and not adding new
4 arguments?

5 THE COURT: I think you argued to death.

6 MS. KLEIN: So do I. If Mr. Risk is going to --

7 THE COURT: You've had oral argument, you've had
8 pretrial briefing. What more is there to say on the law side?
9 You cited cases. You cited them again in the oral argument.
10 You can look them all up. I was thinking not to have any more
11 legal argument.

12 MS. KLEIN: I will consent and agree to that.

13 THE COURT: Unless something really new has arisen
14 where you say I have never heard that legal argument before.

15 MR. RISK: That's fine, your Honor. Thank you very
16 much, your Honor.

17 (Trial concluded)

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